

CT 06-2

Tax Type: Cigarette Use Tax

Issue: Possession of Unstamped Cigarettes

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS**

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

**ABC CONFECTIONARY, WILLIAM
PORTER, sole proprietor;
SMITH JONES**

Respondents

No. 0000-0000-0-00

Cigarette Confiscation

RECOMMENDATION FOR DISPOSITION

Appearances: Kent Steinkamp, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; *JOHN DOE, pro se.*

Synopsis:

The Department of Revenue (“Department”) seized 80 packs of cigarettes from the premises of *JOHN DOE* d/b/a *ABC Confectionary* (“respondent”), located in Anywhere, Illinois. The respondent was not present at the time of the seizure, but his son, *SMITH JONES*, was present. The packages were Missouri stamped cigarettes and did not have Illinois cigarette tax stamps affixed to them as mandated by the Cigarette Tax Act (“Act”) (35 ILCS 130/1 *et seq.*). The Department seeks forfeiture of the cigarettes pursuant to section 18a of the Act, and it also seeks to impose a penalty

pursuant to section 18c of the Act. An evidentiary hearing was held during which *JOHN DOE* appeared but his son, *Smith*, did not.¹ During the hearing, the respondent did not object to the forfeiture of the cigarettes, but he asked that the penalty be abated. He stated that one of his employees purchased the cigarettes in Missouri, and he was not aware that the cigarettes were in his store. For the following reasons, it is recommended that this matter be resolved in favor of the Department.

FINDINGS OF FACT:

1. On January 10, 2006, two Special Agents for the Department's Bureau of Criminal Investigation found 80 packs of Missouri stamped cigarettes in the display case above the cash register at the respondent's business. (Dept. Ex. #1)
2. The cigarettes did not have Illinois cigarette stamps affixed to them. (Dept. Ex. #1)
3. The respondent's son was present during the inspection. The respondent was not present. (Dept. Ex. #1)
4. The respondent is the owner of *ABC Confectionary*. (Dept. Ex. #1; Tr. p. 6)
5. The Department's agents seized the 80 packs of cigarettes. (Dept. Ex. #1)
6. The respondent and his son are not licensed distributors of cigarettes. (Dept. #1)

CONCLUSIONS OF LAW:

Section 13 of the Act provides as follows:

Whenever any original package of cigarettes is found in the place of business or in the possession of any person who is not a licensed distributor under this Act without proper stamps affixed thereto, or an authorized substitute therefor imprinted thereon, underneath the sealed transparent wrapper of such original package, as required by this Act, the prima facie presumption shall arise that such original package of cigarettes

¹ Because *SMITH JONES* did not appear at the hearing, he must be declared to be in default.

is kept therein or is held by such person in violation of the provisions of this Act. 35 ILCS 130/13.

The agents found the 80 packs of Missouri cigarettes at the respondent's place of business and in the possession of his son. The respondent and his son are not licensed distributors under the Act, and the prima facie presumption is that they are in violation of the Act.

Section 18 of the Act states that a duly authorized employee of the Department may seize any original packages of cigarettes that do not bear Illinois tax stamps. 35 ILCS 130/18. If it is determined, after a hearing, that the original packages seized were not tax stamped at the time of seizure, then an order must be entered declaring the original packages confiscated and forfeited to the State. 35 ILCS 130/18a. The respondent in the present case has not disputed the fact that the packages did not have Illinois tax stamps. Therefore, it must be ordered that the 80 packages seized be forfeited to the State.

The Act also contains a provision in section 18c concerning a civil penalty for the possession of not less than 10 and not more than 100 packages of cigarettes. This provision provides as follows:

With the exception of licensed distributors, anyone possessing not less than 10 and not more than 100 packages of cigarettes contained in original packages that are not tax stamped as required by this Act, or that are improperly tax stamped, is liable to pay to the Department, for deposit into the Tax Compliance and Administration Fund, a penalty of \$10 for each such package of cigarettes, unless reasonable cause can be established by the person upon whom the penalty is imposed. Reasonable cause shall be determined in each situation in accordance with rules adopted by the Department. 35 ILCS 130/18c.

The respondent argues that he was not at the store at the time that the agents found the cigarettes. He said that he normally does not purchase cigarettes outside of

Illinois, and he does not have a record of doing anything illegal. He said that the employee who purchased the cigarettes paid full price for them in Missouri without his knowledge. He also contends that he does not make a lot of money at the store, and he operates it mostly as a community service. He said that the store is between two housing projects, and he sells, as cheaply as possible, items that are necessary for the community. He also said that he is a minister, and the store provides an opportunity for him to evangelize as well.

The Department's regulations concerning reasonable cause provide in part as follows:

The determination of whether a taxpayer acted with reasonable cause shall be made on a case by case basis taking into account all pertinent facts and circumstances. The most important factor to be considered in making a determination to abate a penalty will be the extent to which the taxpayer made a good faith effort to determine his proper tax liability and to file and pay his proper liability in a timely fashion. 86 Ill.Admin.Code §700.400(b).

The regulations also state that a "taxpayer will be considered to have made a good faith effort to determine and file and pay his proper tax liability if he exercised ordinary business care and prudence in doing so." 86 Ill.Admin.Code §700.400(c).

The record does not indicate that the respondent exercised ordinary business care and prudence to insure that properly stamped cigarettes were sold at his business. Although the respondent was not at the store at the time of the inspection, he is responsible for insuring that the cigarettes that are sold at the store have Illinois tax stamps on them. The record does not indicate that the respondent took reasonable steps to prevent this incident from occurring. The penalty must, therefore, be upheld.

Recommendation:

For the foregoing reasons, it is recommended that the 80 packs of cigarettes that were seized by the Department on January 6, 2006 be confiscated and forfeited to the State of Illinois. In addition, it is recommended that a civil penalty of \$800 be assessed.

Linda Olivero
Administrative Law Judge

Enter: October 11, 2006